United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 08-1084**
	)	**Issued: June 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Mark S. Coby, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2008 appellant, through her representative, filed a timely appeal from the November 21, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of an earlier decision reducing compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.[1]

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective September 2, 2005 on the grounds that she failed to apply for and undergo vocational rehabilitation efforts when so directed. On appeal, appellant's representative argues that it has made no showing that appellant failed to cooperate with the rehabilitation process.

[1] Appellant does not appeal the Office hearing representative's August 9, 2007 nonmerit decision denying as untimely her request for a hearing.

FACTUAL HISTORY

On February 14, 2000 appellant, then a 49-year-old mail handler, sustained an injury in the performance of duty when she squatted to pick up 15 letters from the workroom floor. The Office accepted her claim for lumbar strain and an aggravation of lumbar herniated disc.[2] After periods of intermittent disability, appellant stopped work in 2003 when she underwent low back surgery. She returned to part-time modified duty in 2004. The employer offered appellant a new job on September 21, 2004 because it was closing her current unit.

After further developing the medical evidence to establish appellant's physical limitations, the Office referred her case to vocational rehabilitation services on June 22, 2005. On June 27, 2005 the employer offered appellant limited duty as a mail processing machine operator.

The vocational rehabilitation counselor received and opened appellant's case on July 5, 2005. On July 8, 2005 she spoke with appellant by telephone and learned that she had returned to work on July 2, 2005 only to leave four hours later because the job did not fit her needs in several respects. Appellant advised that she would not be returning to work until she received approval from a physician. The rehabilitation counselor advised that the information would be documented. It was agreed they would maintain contact by telephone until case direction was requested or provided.

On July 12, 2005 the Office notified appellant: "We have been advised that you have refused to participate in the rehabilitation efforts by the rehabilitation counselor who is acting on behalf of this office. The evidence of record shows that you returned to work on [July] 2, [20]05 however, after working four hours, you left." The Office determined that appellant did not have good cause for leaving work on July 2, 2005 and was "therefore not fully cooperating with vocational rehabilitation." It notified appellant of the penalty for not cooperating with vocational rehabilitation and directed her to contact the rehabilitation counselor within 30 days to make a good faith effort to participate in the rehabilitation effort to return her to gainful employment.

On July 15, 2005 appellant contacted the vocational rehabilitation counselor to advise that she would be returning to work. They agreed to meet with the supervisor at the work site on July 25, 2005. Appellant presented the rehabilitation counselor with medical documentation excusing her from work until then.

Appellant met with the rehabilitation counselor on July 25, 2005 and showed her around the work site, addressing several concerns. She did not work on that date because the supervisor was not available for discussion or supervision. Appellant informed the rehabilitation counselor that she would be returning to work on the next scheduled workday, July 28, 2005 and it was agreed they would meet again at that time. She expressed the hope that problems associated with the job offer had been resolved and that it would be signed at the time of the scheduled meeting.

[2] In a separate claim, the Office accepted that appellant sustained a bilateral shoulder strain, cervical strain and bilateral wrist strain due to the repetitive nature of her work. OWCP No. xxxxxx675. The record indicates it also accepted bilateral carpal tunnel syndrome.

Appellant and her union representative met the rehabilitation counselor on July 28, 2005. It was agreed that a few changes would be made to the job offer that would allow appellant to sign it. The employer issued an amended offer that day and appellant returned to work. However, she left work before her shift was over to go to the emergency room for a reaction, she was having to her medication. A doctor's note placed appellant off work until August 1, 2005. She again left work to go to the emergency room on August 1, 2005 as a result of a bad reaction to working near the machinery. It was agreed that appellant would meet with her supervisor and the rehabilitation counselor on August 4, 2005.

The parties met on August 4, 2005. It was agreed that certain changes would be made to the job, but the rehabilitation counselor stated that appellant needed to sign the offer that date. Appellant complied and added agreed-upon comments. The rehabilitation counselor advised both appellant and her supervisor that appellant would be attempting to perform her work. However, the counselor stressed, in the event appellant was experiencing an exacerbation to her injury or ongoing lightheadedness as a result of her medications, "She may choose to go home early."

After August 4, 2005 appellant frequently contacted the rehabilitation counselor to report physical difficulties and problems associated with her work site, work shift, work table, reaction to medications, required forms and other matters. She asked the rehabilitation counselor to speak with the employer's injury compensation specialist about changing the work hours to the day shift as a result of the dizziness she experienced while driving at night. Appellant advised that she preferred to work only four hours per day on a regular basis. She forwarded extensive medical and related documentation to the rehabilitation counselor for further handling by the Office. The vocational rehabilitation counselor indicated she would meet with appellant's supervisor to discuss the issues associated with the work site. In her September 1, 2005 status report, she observed the following:

> "It is noted that [appellant] has rarely completed an [eight-]hour shift and has frequently traveled to the emergency room in Walnut Creek, CA during the course of her shift in order to seek medical attention and/or a time-off slip. It is not known as to whether the problems that [she] continues to experience will be resolved to the point that she is capable of working an [eight-]hour work shift on a permanent basis."

In a decision dated September 2, 2005, the Office reduced appellant's wage-loss benefits because she failed without good cause to undergo vocational rehabilitation as directed: "Despite our [July] 12, [20]05 warning letter, you stopped working. Therefore, [appellant] have not cooperated with our rehabilitation efforts, and have not returned to work as defined under the terms of our vocational rehabilitation efforts." The Office found that if appellant had participated in good faith in vocational rehabilitation, she would be able to perform in a position similar to the modified mail processing operator position the employer offered on July 28, 2005, a position that would have resulted in no loss of wage-earning capacity.

In decisions dated November 30, 2006 and November 21, 2007, the Office reviewed the merits of appellant's case and denied modification of its prior decision.

LEGAL PRECEDENT

The Office may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.[3] Under section 8113(b) of the Federal Employees' Compensation Act, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would have probably been her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.[4]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5]

ANALYSIS

The Office did not meet its burden of proof to justify the reduction of appellant's compensation effective September 2, 2005. The record does not support that appellant failed to apply for and undergo vocational rehabilitation efforts when so directed.

The Office developed the medical evidence to establish appellant's physical limitations after the employer made an offer of employment on June 27, 2005, after the employer made an amended offer on July 28, 2005 and after the employer agreed on August 4, 2005 to make further job modifications. The record reflects that appellant did not return to work on any consistent basis. But the Office did not terminate appellant's compensation under 5 U.S.C. § 8106(c) for refusing or neglecting to work after suitable work was offered to, procured by or secured for her. It reduced appellant's compensation under 5 U.S.C. § 8113(b) for failing without good cause to apply for and undergo vocational rehabilitation when so directed.

The Board has carefully reviewed the vocational rehabilitation counselor's status reports and can find no evidence after the Office's July 12, 2005 warning letter that appellant failed to apply for or undergo vocational rehabilitation when so directed. She made no comment of any kind that appellant was obstructing her placement efforts or was behaving unreasonably or was otherwise failing to cooperate. There is no evidence showing that appellant refused to meet with the rehabilitation counselor or refused to return her telephone calls or refused to perform specific vocational rehabilitation activities as directed.[6] To the contrary, the record demonstrates that appellant contacted the counselor as directed, met with the counselor as planned, expressed her intention to return to work, continued to maintain frequent contact, supplied the counselor with extensive medical and other documentation, and worked with both the counselor and the supervisor to return to limited duty as a mail processing machine operator. The evidence does

[3] 5 U.S.C. § 8104(a).

[4] *Id*. at § 8113(b).

[5] *Harold S. McGough*, 36 ECAB 332 (1984).

[6] *See D.E.*, Docket No. 06-859 (issued February 23, 2007).

not establish that appellant failed or refused to apply for, undergo, participate in or continue to participate in the vocational rehabilitation effort when so directed.[7]

The Board therefore finds that the Office failed to justify its application of 5 U.S.C. § 8113(b).

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective September 2, 2005. The record does not support that appellant failed to apply for and undergo vocational rehabilitation when so directed.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 5, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[7] *See* 20 C.F.R. § 10.519 (1999).